***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Original with Affidavit of Mailing

# 74-2702

*To be argued by*
LEE A. ADLERSTEIN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-2702**

UNITED STATES OF AMERICA,
*Appellee,*

—*against*—

PATRICK HENRY VALCARCEL,
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

PAUL B. BERGMAN,
LEE A. ADLERSTEIN,
*Assistant United States Attorneys,*
*Of Counsel.*

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## BRIEF FOR THE APPELLEE

### Preliminary Statement

Patrick H. Valcarcel appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*), entered June 25, 1974, following a jury trial, convicting him of bank robbery in violation of Title 18, U.S.C. Section 2113(a), in which he obtained more than $4,000.* Appellant was sentenced to a term of imprisonment for 15 years and is currently incarcerated pursuant to that sentence.

* The indictment against appellant (74 Cr. 204) charged him with three separate crimes arising from his robbery of the Bankers Trust bank in Centereach, Long Island, on February 25, 1974. Each count was derived from Section 2113 and the indictment proceeded in descending order of severity; i.e., Count One, the "(d)" count, Count Two, the "(a)" count, and Court Three, the "(b)" count. Pursuant to the instructions of Chief Judge Mishler, the jury, upon reaching a verdict of not guilty as to Count One, and a guilty verdict on Count Two did not reach a verdict on the third count.

On this appeal, appellant contends (1) that the trial court, in its charge, misled the jury into believing that they could infer his guilt by the mere fact of his possession, shortly after the bank robbery, of $500 in "bait" money without finding that the "bait" money had been stolen; (2) that part of the evidence which showed that the "bait" money had been stolen was improperly admitted in evidence; and (3) that certain evidence which linked appellant with the crime should have been suppressed. Part of that evidence consisted of appellant's raincoat and was seized pursuant to a consent search. The remainder, which were appellant's gloves and scarf, were seized pursuant to a warrant.

## Statement of the Case

### A. Introduction and summary

On February 25, 1974, a lone, armed man robbed the Bankers Trust bank in Centereach, Long Island of $4,066. He wore a raincoat over his clothing and gloves covered his hands. In addition, a scarf covered the bottom half of his face, leaving only his nose and spectacle covered eyes open to view. Part of the stolen money was $500 in prerecorded "bait" money. The robber did not, it appeared, use a getaway car.

On March 4, a week later, appellant, who worked in a nearby carpet store, opened an account at the bank with a $2,000 cash deposit. Mrs. Upham, the teller, recognized a similarity between appellant and the bank robber. Subsequently, an examination of appellant's deposit showed that it contained the entire $500 in "bait" money. He was thereafter arrested and when confronted with his possession of the "bait" money explained that he had received it from an acquaintance and co-worker, Richard Cocciaro, in payment for a car. Subsequently, a scarf, a raincoat, and a

pair of gloves were found at appellant's fiancee's home where he resided. Those items of clothing were identified by three tellers as resembling the items worn by the bank robber. In addition, appellant's eyeglasses were identified from a post-arrest photograph.

At the trial, appellant denied robbing the bank and, revising his original explanation, stated that he had gotten the "bait" money when he cashed three checks at the bank on February 25. In addition, Richard Cocciaro testified that he was present in the bank when it was robbed and that the robber was not appellant.

## B. The Government's case

The Government called as witnesses persons who were in the bank at the time of the robbery. Angela Crimi, the head teller at the bank, testified that a man walked into the bank with a gun in his hand, told her to "stay where you are" and also stated "[i]f you pull the alarm, you're dead" (28).* Crimi was certain that the robber pulled open her teller drawer and "took everything out" (29). The robber was described by Crimi as wearing a "normal", "black raincoat", and as having a "muted green and brown scarf" over his face. The robber was seen to be wearing "square plain black glasses" (56). A gun and a pair of gloves were also in view (31). A raincoat and scarf, seized at appellant's house, were identified by Crimi as the items she saw worn by the robber (45-46).

Mrs. Crimi testified that after the robbery she, with bank auditors, determined that the robber had left her drawer $4,066 short (35). $500 in bait money which Mrs. Crimi said was always kept in her drawer as a "package" of 25 $20 bills, and always kept at the bottom of the drawer, was

* Page references in parenthesis refer to pages in the trial transcript.

missing when the post-robbery count was made (39-40). Crimi testified that her drawer was kept in the vault during non-working hours (40). A regularly verified record of the bait money was introduced into evidence (43-44).

Deborah Brown, the drive-in window teller on duty at the bank at the time of the robbery, described the robber, identified the clothing taken from appellant's house as appearing to be the clothing worn by the robber, and testified that the robber was wearing heavy, thick-framed "dark glasses" (80-81). She stated that she would normally have heard a getaway car leaving the scene but did not hear one after this robbery (87). The apparent absence of a getaway car was particularly significant in light of FBI Agent Lawrence Sweeney's testimony that the carpet store where appellant worked was less than a one minute walk from the bank and that the carpet store, as well as the bank, had rear doors * (159-162).

Denise Upham, a bank employee on duty at the time of the robbery, also identified the coat and gloves taken from appellant's house as appearing to be the items worn by the robber (113-14). She also described the scarf she saw the bank robber wearing and testified that she observed the scarf slip down on the robber's face while the robber was in the bank. Mrs. Upham gave a clear description of the robber's black, thick framed glasses and saw that the robber had sideburns and a mustache (98-100). It was Mrs. Upham who, while on duty seven days subsequent to

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* Michael King, a boy who was employed on a part-time basis at the carpet store, testified that shortly before the robbery he was told by Richard Cocciaro that he, Cocciaro, and appellant would be going for lunch shortly, and that they wished to lock the store. Accordingly, King left. King returned approximately twenty minutes later to find, for the first time in the six months he had been working there, that the door was locked. Inside was the appellant. Cocciaro, who had left the store before King, had not yet returned (174, 181, 186, 197).

the robbery, processed a savings account opening for appellant, recognized that appellant might have been the robber through the similarity of glasses and nose and determined that $500 of the $2,000 in cash appellant attempted to deposit was the bait money that had been taken in the February 25 robbery (103-111).

The Government also presented testimony of FBI Agent Sweeney and Suffolk County Police Officer D. Frank Smimmo which revealed that appellant stated, while under arrest, that he had received the $500 bait money as a car payment from Richard Cocciaro, his co-worker at the carpet store (320, 381). The statement was directly contrary to appellant's contention at the trial that he had received the bait money from a teller at the bank prior to the bank robbery when he cashed three checks.

## C. The defense case

Appellant denied committing the bank robbery. His affirmative case centered around two checks introduced into evidence during the cross-examination of Angela Crimi, which checks, totaling $635, were marked cashed at the bank to the order of the appellant on February 25, 1974 (50-52). Appellant testified that he had received the "bait" money as cash for the checks (270, 277-78). In that regard, appellant's trial attorney vigorously sought to reduce the impact of the testimony of the bank employees by attempting to discredit their memory of the clothing worn by the bank robber and by seeking to establish the possibility that the bait money could have been exchanged to another teller by Mrs. Crimi before the bank robbery. Crimi was firm in testifying, however, that it was against bank practice for tellers to exchange cash (70-72).

Richard Cocciaro, who had known and worked with appellant for six or seven weeks prior to the bank robbery, and who was in the bank when it was robbed, testified that

appellant was not the robber (208, 219). Through cross-examination, the Assistant United States Attorney sought to diminish the weight of Cocciaro's statement on the appearance of the bank robber on the ground that Cocciaro had only a quick glance at the robber and saw a scarf-covered face (227, 229).

## ARGUMENT

### POINT I

### The trial court's charge concerning the inference to be drawn from appellant's recent possession of the "bait" money was proper and was amply supported by the evidence.

Appellant contends that Judge Mishler's charge was rife with plain error. He contends, specifically in Point I that the charge repeatedly failed to impress upon the jury the necessity of finding, as a threshold matter, that the $500 in bait money which he had a week following the robbery, had in fact been stolen. Such a finding by the jury was necessary, appellant urges, before they could draw the inference that appellant had stolen it. Given all this, appellant contends that "There was no way that the defense theory and evidence could get to the jury through the trial court's charges" (Br. p. 13). In Point II of his brief, appellant asserts an allied proposition to the effect that Angela Crimi's testimony concerning the theft of the bait money should not have been admitted because it was speculative. That argument, though treated separately by appellant in Point II, forms part of the underpinning for his contentions respecting the court's charge. Thus, in Point I, appellant contends that "charging the inference in this [case] was arbitrary because there was no legal evidence that the bait

money was in the cash drawer of teller, Angela Crimi [at the time of the bank robbery]" (Br. p. 9).

In brief, the United States believes that appellant's contentions are without merit. Angela Crimi's testimony was properly received, despite defense counsel's vague objections, and by itself provided an adequate basis for the court's charge. Moreover, we believe that appellant's false explanation as to his possession of the bait money was, even without Crimi's testimony, sufficient to warrant the inference that appellant's possession of the bait money was derived from the theft. Finally, as to the instructions of Judge Mishler, we cannot understand any assertion of error when, on two separate occasions he charged the jury that, before any adverse inference could be drawn respecting the bait money, they had to find, "beyond a reasonable doubt," that the money had been stolen (522, 573-574).

The record shows a firm and adequate foundation for Mrs. Crimi's conclusion that she had the bait money in her drawer at the time the robber came into the bank. She testified that the bait money was always kept at the bottom of the drawer (40); the drawer was kept in the vault during non-work hours (40); regular records of the bait money were kept (43) and regular counts of it were made (44); and that it was not bank practice to allow exchanges of cash between tellers. It is clear that in this circuit "testimony as to [business] custom and practice is admissible as circumstantial evidence, subject to the usual condition that its practical value outweigh any possible prejudicial impact" *United States* v. *Oddo,* 314 F.2d 115, 117 (2d Cir.), *cert. denied,* 375 U.S. 833 (1963). See also, *United States* v. *Rossi,* 319 F.2d 701, 702 (2d Cir. 1963); *United States* v. *Delgado,* 459 F.2d 471, 472 (2d Cir. 1972).

Because the testimony of Mrs. Crimi was so strong, it was certainly proper for the jury to conclude that the bait

money had been stolen and to draw the inference that defendant, in possession of the bait money, knew it was stolen. *Barnes* v. *United States*, 412 U.S. 837, 839-40 (1973); *United States* v. *Fay*, 332 F.2d 1020, 1022 (2d Cir. 1964), *cert. denied*, 379 U.S. 983 (1965). This inference, added to the physical evidence in the case and the identification of the defendant by Mrs. Upham, was sufficient evidence on which to convict. Such evidence was not, however, the only evidence that the jury had under consideration. The judge properly instructed the jury that it could consider the fact that appellant had made an exculpatory statement to agent Sweeney and officer Smimmo directly at variance to appellant's defense at trial, as implying that appellant recognized his own guilt (573-75). Such a charge has long been countenanced in this Circuit. *United States* v. *Bando*, 244 F.2d 833, 842 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *United States* v. *DeAlesandro*, 361 F.2d 694, 697-98 (2d Cir.), *cert. denied*, 385 U.S. 342 (1966); *United States* v. *Lacey*, 459 F.2d 86, 89 (2d Cir. 1972).

Appellant's contention, that the judge's charge on the permissible inference was not grounded in sufficient evidence, is not proper. Neither is appellant accurate in stating that the trial judge instructed the jury that the bait money had been stolen, thereby withdrawing a crucial issue from the jury's deliberation.

In support of his argument, appellant quotes from the charge to the jury some twenty times. The Government submits that the summary of the charge that is set out in appellant's brief is not accurately reflective of the charge as it was communicated to the jury. The Government asserts that a reading of the language of the charge in the order in which it was read shows conclusively that Judge Mishler made it clear to the jury that in order to convict it had to decide that the bait money found in the possession of the appellant had been stolen.

Judge Mishler discussed the "bait" money in three separate sequences of his charge. During the introductory stage of the charge the judge gave his first, and by far the shortest discussion of the inferences that could be drawn from the fact of possession of the bait money by the appellant. The Government concedes that the judge did not, in this sequence, mention appellant's defense that the bait money had not been stolen. This portion of the charge, coming so early however, was the most remote in time from the jury's deliberations. In addition, and most importantly, the judge made it clear that the jury would be charged "later" about the inference. Thus, it should have been clear to the jury that it was not receiving the final word on the bait money:

> . . . *I will later charge you* on an inference which you may draw from possession of recently stolen property, which, in this case, was the bait money . . . [emphasis supplied] (502-03).

In the second and longest sequence of the charge discussing the bait money, the judge never suggested the possibility of a *Barnes* v. *United States* type inference without stating to the jury that before drawing such an inference the jury was required to find that the bait money had been stolen by the bank robber.*

The third sequence centering on the "bait" money is found in the supplemental charge given early on the day the verdict was reached. There again the judge explicitly instructed the jury that a finding that the bait money had been stolen was a necessary underpinning for a guilty ver-

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* This sequence is found at pages 522, line 3 through 526, line 14. The judge told the jury that it had to find that the bills were stolen before it could convict. Such a statement is found at four portions of the sequence: page 522, lines 9-11; page 523, lines 2-3; page 524, lines 13-14; page 524, lines 5-10.

dict.* The Government submits that a careful reading of the charge makes it clear that the affirmative defense was not wiped away from the minds of the jurors. Appellant's arguments are thus without merit.

## POINT II

### The consent search was proper.

Shortly after appellant was arrested, local state police officers and an FBI agent went to the home of one Carolyn Klein, appellant's financee. Upon being advised by Ms. Klein that appellant lived there and kept his personal belongings at the premises, the agents requested of Ms. Klein permission to search the home, which she gave. During the course of a search of the garage, the officers found the black raincoat which appellant wore to the bank robbery.** Appellant contends that there was no valid consent to search.

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* The third sequence is found at page 573, line 18 through page 575, line 14. The judge, at page 573, lines 21-22, page 574, lines 1-4 and page 575, lines 10-14, instructed on the affirmative defense. In two places in his charge the judge stated that the jury must find, to convict, that the bait money had been stolen "beyond a reasonable doubt"—page 522, lines 9-11; page 574, lines 1-4.

** In addition to the raincoat, the agents also found inside appellant's car a hand gun which fit the description of the robber's gun which had previously been given by the bank employees. That gun, however, was suppressed by the District Court on the theory that Ms. Klein's consent could not extend to a search of appellant's car. Compare, *United States* v. *Pravato*, 505 F.2d 703, 704 (2d Cir. 1974). It should be noted that Ms. Klein advised the officers, after they had found the gun, that she did not wish the search to proceed any further. The officers complied with her request and thereafter a search warrant (*infra*, Point III) was obtained for the entire premises.

Pursuant to the leading authority in the area of consent searches, *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 227 (1973) Judge Mishler held a hearing to determine, from the "totality of all the circumstances" of the search of the garage in which the raincoat was found, whether government agents had obtained a genuine consent from Ms. Klein, the owner of the house.

Appellant's trial counsel admitted that Ms. Klein had such authority over the garage as to allow a legally permissible search of it (H. 18).* See *United States* v. *Matlock,* 415 U.S. 164, 170-171 (1974); *United States* v. *Pravato,* 505 F.2d 703, 704 (2d Cir. 1974); *United States* v. *Gradowski,* 502 F.2d 563, 564 (2d Cir. 1974); *United States* v. *Jenkins,* 496 F.2d 57, 71-72 (2d Cir. 1974).

Mrs. Klein testified that she stated to the agents that appellant kept some of his clothing in the garage (H. 34). She stated that she "took" the agents into the garage after the agents told her they could obtain a warrant and that she understood from the agents that she could order them to stop searching at any time (H. 35).** Moreover, the agents did stop searching when Ms. Klein so instructed them (H. 36). The testimony of agent Richard McMullen was perfectly consistent with that of Ms. Klein (H. 47).

The Government submits that the judge was correct in ruling that "the owner of the house, Carolyn Klein, knowingly and willfully waived her right against unreasonable search and seizure and knowingly gave consent to a limited

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* Page numbers in parenthesis preceded by the letter "H." refer to the hearing minutes of ~~August 29, 1974~~. April 22, 1974

** This circuit has recently held that a consent search was proper where the consenting party, who was in that case under arrest, was told that a warrant could be obtained. *United States* v. *Faruolo,* — F.2d — (2d Cir. Slip Opinions, 5825; October 29, 1974).

search in the garage and the Government proved [this] . . . beyond a reasonable doubt" (H. 68). There is no reason to overturn the ruling of Judge Mishler, who "saw and heard the witnesses" *United States* v. *Fernandez,* 456 F.2d 638, 640 (2d Cir. 1972).

## POINT III

### The search warrant properly described the things to be seized and the place to be searched and was properly executed.

The search warrant in this case, a state warrant, provided for the search of "9 John Street, Shoreham, New York occupied by Carolyn Klein . . . and of any other person thereat or therein . . ." It provided for the seizure of ". . . unlawfully possessed firearms, a green plaid scarf . . . and any other evidence and proceeds of the robbery at Bankers Trust . . . on February 25, 1975." The affidavit in support of the warrant detailed the bank robbery, the previous arrest of appellant and noted that appellant had possessed the "bait" money. It further noted that, according to Carolyn Klein—the owner of 9 John Street—appellant did "periodically" live there and that he stored personal property there. The described premises was a one family residential house (H. 27). When the warrant was executed, the scarf and a pair of gloves were seized in appellant's rooms in the basement of the house.

Appellant claims that the search warrant was defective in form and execution. He claims, specifically, that the gloves were improperly seized because they were not named in the warrant; that the "green plaid scarf" was in reality a "multi-colored mottled camouflage design scarf;" that the warrant did not authorize a search of appellant's rooms within the house; and, finally, that the warrant was defective because he "was not named in the warrant" (Br. p. 23).

Appellant's claims are without merit. The variance between the description of the scarf in the warrant and the scarf seized was immaterial. See *United States* v. *Dzialak*, 441 F.2d 212, 217 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971) where the search warrant specified "binoculars" but where other optical equipment was found to be properly seized. See also, *People* v. *Moss*, 34 A.D. 2d 986, 312 N.Y.S. 2d 417, 418 (2d Dept. 1970);* *People* v. *Neulist*, 43 A.D. 2d 150, 158-59, 350 N.Y.S. 2d 178, 187-88 (2d Dept. 1973); N.Y.C.P.L. §690.10(3). Appellant's contention that his rooms could not be searched under the warrant is far fetched. Cf. *United States* v. *Cataldo*, 433 F.2d 38, 40 (2d Cir. 1970), *cert. den.*, 401 U.S. 977 (1971). As far as the gloves are concerned, they were useful in covering up fingerprints and were, as such, instrumentalities of the crime. They were, therefore, properly seized even though not specifically described in the warrant. *United States* v. *Pardo-Bolland*, 229 F. Supp. 473, 477-78 (S.D.N.Y. 1964), *aff'd*, 348 F.2d 316 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965); *United States* v. *Alloway*, 397 F.2d 105, 110-11 (6th Cir. 1968). See also *United States* v. *Scharfman*, 448 F.2d 1352, 1354 (2d Cir. 1971), *cert. den.*, 405 U.S. 919 (1972). Finally, we are unaware of any requirement that appellant's name, which was spread throughout the affidavit, also had to appear on the face of the warrant.

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* This Court has left open the question whether a search conducted under a state issued warrant and executed by federal officers must conform with state standards. *United States* v. *Ravich*, 421 F.2d 1196, 1201 n. 5, *cert. denied*, 400 U.S. 834 (1970).

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

January 27, 1975

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

PAUL B. BERGMAN,
LEE A. ADLERSTEIN,
*Assistant United States Attorneys,*
*Of Counsel.*

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ADDRESS REPLY TO
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United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

January 30, 1975

Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: United States v. Patrick Henry Valcarcel; Apeal No. 74-2702

Dear Sir:

The Government's brief filed January 27, 1973 contains one error. The first footnote on page 11 contains the date August 22, 1974. That date should be April 22, 1974.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By Lee A. Adlerstein
Lee Alan Adlerstein
Assistant U.S. Attorney

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of January 1975 he served two copies of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Charles Sutton, Esq.
299 Broadway
New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
29th day of January 1975

John B. Cole

JOHN B. COLE
Notary Public, State of New York
No. 24-0381965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976